IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK LEWIS BOWMAN, No. 67656

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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PETITION FOR EN BANC RECONSIDERATION

Introduction

A jury convicted Bowman of trafficking in a controlled substance. A Panel of this Court reversed Bowman's conviction because two jurors performed experiments during their deliberations to investigate the parties' respective theories of the case. *Bowman v. State*, ___ P.3d ___, 2016 WL 1701774, 132 Nev. Adv. Op. 30 (April 28, 2016).

The State requested rehearing, but the Panel denied the request. The State submits the Panel misapprehended a material fact which misguided it in its analysis of prejudice. Moreover, the district court made a specific

finding of fact regarding the prejudicial effect of the jurors' investigations that this Court should have deferred to, but did not. Thus, the Court should grant en banc reconsideration to maintain the standard of review in reviewing a district court's findings of fact.

Specifically, the Panel states that both jurors admitted that their experiments influenced them to change their votes or to reinforce their previously held positions. One juror, however, never stated that his experiment influenced him in any way. The other juror stated in his affidavit that he changed his vote after his experiment; but he also testified under oath in the district court that his affidavit was wrong. He testified he did not think his investigation helped to confirm his guilty vote. The district court accepted the juror's in-court testimony instead of his affidavit, finding that "the independent experiments did not change the votes of the jurors who conducted them . . . ." (Appellant's Appendix, 414). Further, that juror never stated in his affidavit that he voted to find Bowman guilty as a result of his experiment.

Even though the standard of review regarding the prejudicial effect of juror misconduct is whether there is "a reasonable probability that the

independent experiments" "would have influenced the average, hypothetical juror," *Meyer v. State*, 119 Nev. 554, 561, 565, 566, 80 P.3d 447, 455, 456 (2003), where the district court makes a specific finding of fact regarding prejudice, this Court should defer to that finding.

Argument

A. The Court should grant en banc reconsideration to maintain this Court's standard of review of a district court's factual findings. The Panel rejected the district court's finding that the jurors' experiments did not influence them in finding Bowman guilty, but the district court's findings are based on substantial evidence–the jurors' post-trial testimony.

En banc reconsideration of a panel decision may be ordered when "reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals." NRAP 40A(a).

The Court reviews a district court's denial of a motion for a new trial based upon juror misconduct for abuse of discretion and will not disturb the district court's findings absent a showing of clear error. *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003). "[W]here the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, *de novo* review of a trial court's conclusions regarding

the prejudicial effect of any misconduct is appropriate." *Meyer v. State*, 119 Nev. 554, 561-62, 80 P.3d 447, 453 (2003) (*citing United States v. Saya*, 247 F.3d 929, 937 (9th Cir.2001)). This means that the Court must defer to the district court's factual findings if supported by substantial evidence and not clearly erroneous, but that it can review the district court's finding of prejudice *de novo*. *See Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). "Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." *Meyer*, 119 Nev. at 564, 80 P.3d at 455. "[T]he district court is required to objectively evaluate the effect [the extrinsic material] had on the jury and determine when it would have influenced 'the average, hypothetical juror.'" *Zana v. State*, 125 Nev. 541, 548, 216 P.3d 444, 448 (*quoting Meyer*, 119 Nev. at 566, 80 P.3d at 456).

After the first day of deliberation, two jurors performed experiments regarding the parties' theories of the case. When the jury returned the next day, it convicted Bowman of trafficking in a controlled substance. Bowman filed a motion for new trial, and the district court held a hearing on the motion where the two jurors testified. After considering the evidence and

testimony, the district court concluded that the jurors' experiments did not change their votes, nor did the experiments affect any of the other jurors because they did not become aware of the experiments until after the foreman had signed the verdict and given it to the district court.

The Panel reversed the district court, finding that "the extraneous information would have influenced the average, hypothetical juror[,]" so that there is a reasonable probability that the independent experiments affected the jury's verdict[.]" *Bowman, supra*. Among other things, the Panel found that two jurors disclosed to counsel that they had relied on the experiments either to change their votes or to reinforce their previously held positions:

> Although there is some dispute as to whether and how the independent experiments were disclosed to fellow jurors, it is clear that two jurors conducted independent experiments testing two primary theories of the case and returned to participate in jury deliberations after being influenced by that extrinsic evidence. Those jurors later disclosed to counsel that they relied on those experiments–either to sway them to change their votes or to reinforce their previously held positions–before rendering a verdict.

Id.

The State believes the Panel misapprehended a material fact when it found that the jurors disclosed to counsel that they relied on their experiments "either to sway them to change their votes or to reinforce their

previously held positions." One juror never made such a disclosure. And the district court implicitly found otherwise as to the other juror. Thus, the Panel failed to defer to the facts the district court found, and failed to follow the appropriate standard of review.

Juror Tsuda submitted an affidavit before the hearing on Bowman's motion for new trial where he explained he put some sugar in a bag and tried to get it to stick to his shoe (Appellant's Appendix, 374-75). The bag did not stick to his shoe. The experiment was relevant because Bowman's theory of the case was that a deputy sheriff inadvertently brought a bag of drugs on the sole of his shoe into the jail's holding area, and that it fell off his shoe, where it was found next to Bowman. *Id.* at 275-85.

Juror Tsuda, however, never stated in his affidavit that his experiment influenced his vote, i.e., that he relied on the experiment either to change his vote or to reinforce his previous vote. *Id*. at 374-79. At the evidentiary hearing on the motion for new trial, Juror Tsuda testified he voted to find Bowman guilty before he performed his experiment. *Id*. at 385. Juror Tsuda never testified that his investigation affected or influenced any part of his

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deliberation or vote to find Bowman guilty. The Panel misapprehended that fact when it found otherwise.

Juror Nielson stated in his affidavit that he performed an experiment where he put some dirt in a plastic bag, put the bag in his sock, and tried to remove the bag without using his hands, but failed. *Id*. at 368. He stated he told the other jurors about his experiment the following morning during deliberation and that he changed his vote. *Id*. at 369-70. He also stated that the foreman asked if anyone had changed their vote from the previous day. *Id*. at 371. In response to that question, Juror Nielson stated that he said he had changed his vote and explained why he had done so. *Id*.

At the hearing on the motion for new trial, Juror Nielson testified he voted to find Bowman guilty before he performed his experiment. *Id*. at 394, 395. He testified his statements in his affidavit–that he told the other jurors the following morning the results of his experiment and that he had changed his vote–were incorrect. *Id*. at 394. He further testified he did not think his investigation helped to confirm his guilty vote. *Id*. at 396.

The district court denied the motion for new trial after Juror Nielson and Juror Tsuda testified. *Id.* at 413-14. The district court found there was

"no reasonable probability the verdict was affected because the evidence before it is that the independent experiments did not change the votes of the jurors who conducted them and the results of the experiments were not broadcast to other jurors until after a unanimous guilty verdict had been reached." *Id.* at 414.

Thus, while Juror Nielson stated in his affidavit that he changed his vote after his experiment, he repudiated that statement when he testified under oath in the district court. The district court accepted Juror Nielson's courtroom testimony of what happened over what he stated in his affidavit. It was within the district court's province to determine what version of Juror Nielson's accounts to accept. *See Lay v. State*, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994) ("it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony."); *Azbill v. State*, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) ("Where questions of fact are dependent upon the credibility of witnesses, the jury is entitled to decide questions of credibility and the weight to be attached to their testimony."). Accordingly, this Court should defer to the

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district court's finding that Juror Nielson's experiment did not influence him to change his vote.

Moreover, even if one were to accept the truth of Juror Nielson's statements in his affidavit, he never expressly stated that he decided that Bowman was guilty as a result of his experiment (Appellant's Appendix, 367-72). And it is difficult to see the probative value in Juror Nielson's affidavit relative to the influence it could have had where the result of his experiment actually benefitted Bowman.

In short, Juror Tsuda never made a statement–either in his affidavit, at the new trial hearing, or elsewhere–that his experiment reinforced his previous vote, or swayed him to change his vote.

While one might read Juror Nielson's affidavit to suggest his experiment influenced him, the affidavit never explicitly states so. More importantly, the district court accepted Juror Nielson's testimony that contradicted his affidavit. Juror Nielson testified he voted to find Bowman guilty before his experiment, and he also testified he did not believe his experiment helped to confirm that vote. The district court was in the best position to decide what version was more credible. Since substantial

evidence supports the district court's findings that neither juror was influenced by their experiments, this Court should defer to those findings. To the extent this Court finds Juror Nielson's statements in his affidavit more credible than his courtroom testimony, the Court is prohibited from making such a finding–that finding lies exclusively with the trial court. *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) ("This court is not a fact-finding tribunal; that function is best performed by the district court.").

It is true that "*de novo* review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate." *Meyer*, 119 Nev. at 561, 80 P.3d at 453 (2003). Thus, while this Court may review *de novo* the prejudicial effect on the "average, hypothetical juror," this Court must still respect the district court's factual findings, if supported by substantial evidence and not clearly wrong.

One of the most important facts the Panel used in determining whether the average, hypothetical juror would have been influenced by the jurors' experiments is the Panel's finding that the two jurors "disclosed to counsel that they relied on those experiments–either to sway them to change their votes or to reinforce their previously held position–before rendering a

verdict." *Bowman, supra*. As discussed above, the Panel should not have relied on that finding. Accordingly, the State respectfully requests the Court to grant en banc reconsideration.

DATED: July 5, 2016.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for en banc reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this petition for en banc reconsideration has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Constantia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this petition for en banc reconsideration complies with the page- or type-volume limitations of NRAP 40A(d) because it does not exceed 4,667 words (2,012).

DATED: July 5, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on July 5, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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